No. 16,393

IN THE

United States Court of Appeals

For the Ninth Circuit

DAVID NAUMU,
Appellant,

vs.

TERRITORY OF HAWAII,
Appellee.

Upon Appeal from the Supreme Court for the Territory of Hawaii.

APPELLANT'S BRIEF.

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Subject Index

Table of Authorities Cited

Statutes

Miscellaneous

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APPELLANT'S BRIEF.

Appellant, a defendant in a criminal action, has appealed from a judgment of the Supreme Court of the Territory of Hawaii, affirming the judgment of the District Court of Honolulu, County of Honolulu, Territory of Hawaii.

STATEMENT OF JURISDICTION.

Appellant was orally charged in the District Court of Honolulu, County of Honolulu, Territory of Hawaii, that he "did conduct a gambling game in which machines were used or in which something of

value was won or lost, to-wit: free games on the pinball machines, contrary to Section 11343 of the Revised Laws of Hawaii, 1945." (Now, Sec. 288-4, R.L.H. 1955.)

Following the over-ruling of a demurrer interposed by appellant to the charge, the District Court entered judgment from which an appeal was taken to the Supreme Court of the Territory of Hawaii, where said judgment was affirmed.

The jurisdiction of this Court to review said judgment of the Supreme Court of the Territory of Hawaii is sustained by Section 1293, 28 USCA, this case being one in which "the Constitution, laws or treaties of the United States or any authority exercised thereunder" is involved.

STATEMENT OF THE CASE.

Appellant was orally charged in the District Court of Honolulu, County of Honolulu, Territory of Hawaii, on January 9, 1958, with conducting a gambling game in which machines were used or in which something of value was won or lost, to-wit: free games on the pinball machines. On January 13, 1958, a demurrer to the charge was filed by appellant, alleging that:

1. The charge failed to state facts sufficient to constitute a violation of Section 11343, Revised Laws of Hawaii, 1945, in that the giving of "free games" did not constitute the giving of "anything of value" within the meaning and prohibition of said gambling statute;

2. That said Section 11343 is invalid, defective, null and void, in violation of appellant's right under the Fifth and Fourteenth Amendments to the Constitution of the United States in that said statute is vague, indefinite and uncertain;

3. That said Section 11343 is invalid, defective, null and void, in violation of appellant's property rights under the Fifth and Fourteenth Amendments to the Constitution of the United States, as applied herein, to the operation of a pinball machine game wherein free games may be awarded to a successful player.

On January 24, 1948, the demurrer was over-ruled, following which the case was submitted on an agreed statement of facts, that appellant did operate and maintain a pinball machine game wherein free games were won or lost. (T. 7.) Appeal from the judgment of the said District Court was taken on points of law as stated in the demurrer and the agreed statement of facts. (T. 7, 8, 9, 10, 15.) Appellant gave notice of appeal from said judgment on January 31, 1958, which appeal was perfected on February 18, 1958. Pursuant to such appeal, the Supreme Court of the Territory of Hawaii affirmed the judgment of the District Court of Honolulu by its judgment filed on February 2, 1959.

On February 9, 1959, appellant filed his amended notice of appeal in the United States Court of Appeals for the Ninth Circuit. The appeal was docketed in said Court on March 7, 1959.

SPECIFICATION OF ERRORS RELIED UPON.

1. The Supreme Court of the Territory of Hawaii erred in affirming the judgment of the District Court of Honolulu, County of Honolulu, Territory of Hawaii, in ruling that the charge as stated constituted a violation of Section 11343, Revised Laws of Hawaii, 1945. (T. 28.)

2. The Supreme Court erred in ruling that said Section 11343 did not violate appellant's constitutional rights in that said statute is not vague, indefinite and uncertain. (T. 28.)

ARGUMENT OF THE CASE.

ISSUE INVOLVED.

Reduced to its simplest terms, this appeal poses the question as to whether the awarding of free games upon the attainment of a certain score, in a pinball machine game, constitutes a violation of the gambling statute of the Territory of Hawaii.

SUMMARY OF ARGUMENT.

In determining whether a criminal charge states facts sufficient to constitute violation of a criminal statute, the Court must attempt interpretation of the statute whenever there is an ambiguity. An ambiguity may be found to exist even in language unambiguous on its face. And in construing a particular statutory phrase, the Court must look to not only other provisions of the same statutes using the same language

whether they are strictly *in pari materia* or not. The Court must also follow statutory guides for construction. In addition, the Court must construe the criminal statute strictly in favor of the accused, whenever that is possible.

The Constitution of the United States requires that statutes defining criminal offenses must not be vague, indefinite, or uncertain. The abstract tests suggested by the many cases are not very helpful in determining whether a particular criminal statute is fatally vague, indefinite, or uncertain. The language of the statute questioned must be carefully examined with the question of whether fair notice has or has not been given to those who may be affected thereby.

SPECIFICATION OF ERROR NO. 1.

THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN RULING THAT THE CHARGE STATED FACTS SUFFICIENT TO CONSTITUTE A VIOLATION OF SECTION 11343 OF THE REVISED LAWS OF HAWAII, 1945.

The first specification of error raises the question of the interpretation of Section 11343, Revised Laws of Hawaii, 1945, under which appellant was charged. The Supreme Court of the Territory of Hawaii apparently treated this specification as only involving the meaning to be given one phrase of the said statute. (T. 15, 16.) No discussion was made and the specification dismissed by a reference to *Territory v. Uyehara, infra.*

It is submitted that the said specification involves issues broader than that considered by the Hawaii

Supreme Court as will appear, *infra.* However, the appellant does not concede that the Hawaii Supreme Court was right in its ruling that "anything of value" included free games won on pinball machines. In the *Uyehara* case, the Hawaii Supreme Court first stated that it was not necessary for a pinball machine game to be *ejusdem generis* with the games enumerated in the said Section 11343, but that if it had to be, such a game was a "banking" game and hence a game that was specifically enumerated. It then proceeded to hold that a "free game" won on a pinball machine was "anything of value". As will be considered later, the said statute has two phrases describing the stakes, one applicable to the enumerated games and one applicable to "any other game". It will be noticed that the charge that was actually given in this case refers to "something of value" and not "anything representative of value". (T. 3.) Appellant's discussion will cover not only the disputed phrase "anything of value" but also the phrase "anything representative of value" in attempting to show that the Hawaii Supreme Court erred in its ruling on the first specification of error.

The Courts of the several states are not in unanimity as to whether free games can properly be considered as "anything of value", or encompassed within the meaning of words having a substantially equivalent meaning. Perhaps the latest case in point is that of *McNeice v. City of Minneapolis,* 250 Minn. 142, 84 N.W. 2d 232 (1957). In that case, the Court stated on page 144:

"There is a sharp division of authority on the question of whether a pinball machine awarding only free replays constitutes a gambling device. It appears that in those jurisdictions where the statutes do not expressly mention whether such machines are illegal, the determination is left to the courts. In those jurisdictions where the statutes do not expressly mention free-play machines, the majority holding is that free plays as an award for successful operation of pinball machines do not constitute property or a thing of value." (Citations omitted.)

In accord are numerous cases from many jurisdictions including the following:

Washington Coin Machine Assn. v. Callahan, 79 App. D.C. 41, 142 F. 2d 97 (1944);

Chicago Patent Corp. v. Genco, Inc., 124 F. 2d 725 (1941);

Davies v. Mills Novelty Corp., 70 F. 2d 424 (1934);

Mills Novelty Co. v. Farrell, 64 F. 2d 476 (1933);

State v. Waite, 156 Kan. 143, 131 P. 2d 708, 148 ALR 874 (1942);

State v. One Bally Coney Island No. 21011 Gaming Table, 174 Kan. 757, 258 P. 2d 225 (1953);

State v. Betti, 23 N.J. Misc. 169, 42 A. 2d 640 (1945);

Overby v. Oklahoma City, 46 Okla. Cr. 42, 287 P. 796 (1930);

Wigton's Return, 151 Pa. Super. 337, 30 A. 2d 352 (1943);

Commonwealth v. Kling, 140 Pa. Super. 68, 13 A. 2d 104 (1940);

State v. One "Jack and Jill" Pinball Machine (Mo. App.), 224 S.W. 2d 854 (1949);

Crystal Amusement Corp. v. Northrop, 19 Conn. Supp. 498, 118 A. 2d 467 (1955);

Gayer v. Whelan, 59 Cal. App. 2d 255, 138 P. 2d 763 (1943);

People v. Jennings, 257 N. Y. 196, 177 N.E. 419 (1931).

In *Washington Coin Machine Ass'n v. Callahan,* supra, the Court said:

> "Enough has been said to indicate that the issue below and here is limited to the question whether the award of a free play or a second try, in the circumstances we have described, makes such a device a gaming table and its use a game of chance 'for money or property' . . . Whatever inducing motives may actuate the restless, the idle, or the curious to spend their time in this silly form of amusement, it certainly is not the gambling instinct, nor is it the incitement to gain by chance, any more than is the game of solitaire. In the one case no more than in the other is there the hope or chance of a reward which is either money or property."

In *Chicago Patent Corp. v. Genco, Inc.,* supra, the Court said:

> "Nothing of monetary value, nothing susceptible of purchase and sale passes to the successful player. At the most, he receives merely an opportunity to continue freely his use of the device

> for the enjoyment of which he has originally invested a coin. . . ."

In *People v. One Mechanical Device,* 11 Ill. 2d 151, the Illinois Supreme Court said that:

> "We are of the opinion that a free play is neither money, the equivalent of money, nor a valuable thing. It is unrealistic to hold that the possibility of winning a greater or lesser amount of amusement is gambling because if it were, most amusement games would be barred by the statute. . . ."

In so doing, that Court reversed its intermediate Appellate Court which had held contra. *People v. One Mechanical Device,* 9 Ill. App. 2d 338. It also overruled *People v. One Pinball Machine,* 316 Ill. App. 161, 44 N.E. 2d 950.

From the above quotations it is clear that a substantial number of Courts are of the opinion that the phrase "anything of value" or a substantially equivalent phrase does not include free games awarded during the play of pinball machines. In the *McNeice* case, supra, it is stated that the majority holding is to that effect. However, as indicated in that case, there is a contrary line of cases. Probably the latest is that of *Territory of Hawaii v. Uyehara,* 42 Haw. 184 (1958).

In that case, the Supreme Court of the Territory of Hawaii was faced with the identical question here presented. The Court decided that "anything of value" included within its phraseology free games awarded for playing pinball machines. However, that case was not appealed to the Ninth Circuit Court of Appeals because the appeal to the Supreme Court had

been from an interlocutory ruling. Hence, this point has never been presented for a ruling by this Honorable Court.

In the *Uyehara* case, supra, the Hawaii Supreme Court held that since a pinball machine game was played for amusement, and since "a right to obtain amusement" has value, that, therefore, a free game on a pinball machine was "anything of value". To buttress its conclusion, the Hawaii Court relied on only one case, that of *Giomi v. Chase,* 47 N.M. 22, 132 P. 2d 715, wherein a similar phrase was stated to be unambiguous and all encompassing and that there was no necessity for interpretation. Admittedly, if statutory language is free from ambiguity, there would be no necessity for judicial interpretation. But the lawbooks are replete with instances where literal statutory language has been torn apart by the Courts, some of them being justified by a desire to ascertain "the true intent" of the legislatures. At the risk of being irreverent, it is here urged that, at the least, there is ambiguity in the phrase "anything of value". It is further urged that if such phrase were unambiguous, what could have prompted the majority of the Courts of last resort to not only attempt a construction of the same or similar phraseology but to construe it as excluding free games from its meaning? It is submitted that the failure of the Hawaii Supreme Court to go beyond the holding of *Giomi v. Chase,* supra, was error.

Assuming that the Hawaii Supreme Court erred in not attempting a construction of the disputed

phrase, "anything of value", it should have referred to the statute laws of the Territory of Hawaii dealing with the subject of statutory construction, specifically Sections 1-17, 1-18, and 1-21 of the Revised Laws of Hawaii, 1955.

Section 1-17, supra, states that:

> "The words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular meaning."

Here we have a legislative admission that words may have more than one meaning and that "the general or more popular use or meaning" shall be preferred. As applied to the instant case, can there be any doubt as to the popular or general understanding of the composite elements of gambling? Can there be any doubt as to what the man in the street will say if approached on the question of whether free games awarded during the play of pinball machines, bearing in mind that the disputed phrase has been a part of the gambling statute since at least 1893? Section 11343, Revised Laws of Hawaii, 1945. Admittedly the instant case was before the Supreme Court on points of law and on an agreed statement of facts, but it is submitted that the Honorable Court could properly have taken judicial notice of the general or popular conception on the disputed point. It is submitted that disregard of a statutory mandate on the very thing the Hawaii Supreme Court was called upon to do was error.

Section 1-21, supra, states that:

> "Laws *in pari materia,* or upon the same subject matter, shall be construed with reference to each other. *What is clear in one statute may be called in aid to explain what is doubtful in another.*" (Emphasis added.)

On this same subject American Jurisprudence states:

> "Ordinarily, the same words used in different statutes on the same subject are interpreted to have the same meaning." 50 Am. Jur. 260, Sec. 272.

> "It has been stated generally that no single statute should be interpreted wholly by its own terms. Thus, in the interpretation of a statute, it is sometimes regarded as proper to consider statutes upon cognate subjects, although not strictly *in pari materia. . . .*" 50 Am. Jur. 343, Sec. 347.

> "Under the rule of statutory construction of statutes *in pari materia,* statutes are not to be considered as isolated fragments of law, but as a whole, or as parts of a great, connected, homogeneous system, or a single and complete statutory arrangement. Such statutes are considered as if they constituted but one act, so that sections of one act may be considered as though they were parts of the other act, as far as this can reasonably be done. Indeed, as a general rule, where legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, and they should be so construed as to harmonize the

> general tenor or purport of the system and make the scheme consistent in all its parts and uniform in its operation, unless a different purpose is shown plainly or with irresistible clearness. . . ." 50 Am. Jur. 346, Sec. 349.
>
> "Although there may be statutory provisions which, in a sense, relate to the same matter and yet are not *in pari materia,* the general rule is that statutes or statutory provisions which relate to the same person or thing, or to the same class of persons or things, or to the same or a closely allied subject or object, may be regarded as *in pari materia. . . .*" 50 Am. Jur. 347, Sec. 350.

From the foregoing, it is clear that resort may be had to other statutory language in determining the meaning of disputed language, even though such language may not be strictly *in pari materia.* An examination of the Revised Laws of Hawaii, 1955, in effect when the Hawaii Supreme Court was called upon to decide the instant case and, so far as our cited examples are concerned, identical with what is contained in the Revised Laws of Hawaii, 1945, discloses certain instances of legislative use of the phrase "anything of value" or the use of substantially similar phraseology.

The first is taken from Chapter 288 of the Revised Laws of Hawaii, 1955, entitled Gambling, Lottery. Section 288-16, supra, provides that:

> "Whoever by playing at cards or other game, or by betting on the sides or hands of those who do play, loses any sum of money, or *thing of value,* and pays or delivers the same or any part thereof, may sue for and recover the money or

> *value of the thing so lost* and paid or delivered, from the winner thereof." (Emphasis added.)

Nothing of the language of the said Section 288-16 indicates a legislative intention to exclude from its scope any of the acts prohibited by Section 11343 of the Revised Laws of Hawaii, now Section 288-4 of the Revised Laws of Hawaii, 1955. The so-called gambling statute under which appellant was charged provides that:

> "Every person who deals, plays or carries on, opens or causes to be opened, or who conducts either as owner or employee, whether for hire or not, any game of faro, monte, roulette, tan, fan tan, or any banking or percentage game played with cards, dice, or any device for money, checks, credit or *anything representative of value* or any other game in which money or *anything of value* is lost or won, and every person who plays or bets at or against any such prohibited game or games and every person present where such game or games are being played or carried on, is guilty of a misdemeanor." (Emphasis added.)

Obviously, under both statutes quoted above, the only thing that a player can lose under the agreed statement of facts, is the coin he places in the pinball machine. Conversely, the only thing that the owner of the machine can lose is one or more free games. In the event that the player loses under Section 288-16, supra, he may recover the coin that he lost. In the event that the player wins, the owner, then being the loser, can sue to recover the value of the free game or games lost. A corollary to the latter contingency

is that there must be a determination of the value of a free game in monetary terms, which must be something less than the coin used to play the game in the first instance. Obviously, any enforcement of Section 288-16, supra, as applied to pinball machines under the facts agreed to would lead to an absurdity and therefore Section 288-16 cannot be so construed by virtue of Section 1-18 (c), supra, which provides that: "Where the words of a law are ambiguous: . . . Every construction which leads to an absurdity shall be rejected."

Admittedly, the legislature could have stated that a "loser" may sue to recover what he lost or the value of it from a "winner" with the exception of pinball machine games where only free games are awarded to a successful player, assuming that such games are prohibited by Section 11343, supra. There is no language in the said Section 288-16 indicating that only some "losers" could have the benefit of that act. The language is "*whoever* loses" may sue. And whether the said Section 288-16 is considered *in pari materia* to the said Section 11343, the Court should examine it in trying to determine the meaning of the said Section 11343. And if it does, it must conclude that the legislature must have intended to give the said Section 11343 a more restricted meaning insofar as to what is meant by "anything of value."

Other instances of legislative use of the disputed phrase "anything of value" can be found in Title 31 of the Revised Laws of Hawaii, 1955, which can be denominated the Hawaiian Criminal Code. It is used,

for example, in the following sections of said Title 31. Section 281-1 provides: "If any person who is intrusted with, or has the possession, control, custody or keeping *of a thing of value* of another . . . he is guilty of the embezzlement of that thing." (Emphasis added.)

Section 283-1 provides: "Extortion is the wresting *of anything of value* from another by duress, menace, or by any undue exercise of power." (Emphasis added.)

Section 288-7 provides: "Every person who by the game of 'three card monte,' 'shell game' or any other game, device, sleight of hand, pretension of fortune telling, trick or other means whatever by use of cards or other implements or instruments, or while betting on sides or hands of any such play or game, fraudulently obtains from another person money or *anything of value,* is guilty of a misdemeanor." (Emphasis added.)

Section 289-19 provides: "Every person who obtains, or attempts to obtain, from any other person or persons any money, property, credit or *other valuable thing,* by means . . ." (Emphasis added.)

Section 306-1 provides: "Robbery is the stealing of *a thing* from the person of another or from his custody in his presence, by force or putting him in fear." (Emphasis added.)

In all of the statutory provisions above quoted, obviously the phrase "thing of value" or "anything of value" did not cover free games awarded to play pin-

ball machines because such construction would be absurd. And such provisions though perhaps not *in pari materia* to Section 11343, supra, are within the Criminal Code, and should be used by the courts in resolving legislative ambiguity. Where the legislature has repeatedly used the same words, there is at least a strong inference, if not a presumption, that the legislature intended them to have the same meaning in each instance, at least in the absence of clear, contrary manifestation of intention. 50 Am. Jur. 259, 260, Sections 271 and 272. Such an inference is a compelling one in the instant case as all of the quoted sections of the Criminal Code using the phrase "anything of value" or "thing of value" treat it as having the same meaning with the exception of the meaning that the Hawaii Supreme Court gives it in interpreting Section 11343, supra.

Not only should the Hawaii Supreme Court have considered related statutes but it should have also considered the same statute, in which the disputed phrase appears in its entirety. And, as hereinbefore stated, the issues involved under this specification could not properly be limited to an interpretation of "anything of value" but whether the charge stated facts sufficient to show a violation of Section 11343, supra.

Section 11343 of the Revised Laws of Hawaii, 1945, now Section 288-4 of the Revised Laws of Hawaii, 1955, under which appellant was charged, provides:

> "Every person who deals, plays or carries on, opens or causes to be opened, or who conducts

> either as owner or employee, whether for hire or not, any game of faro, monte, roulette, tan, fan tan, or any banking or percentage game played with cards, dice or any device for money, checks, credit or *anything representative of value* or any other game in which money or *anything of value* is lost or won, and every person who plays or bets at or against any such prohibited game or games and every person present where such game or games are being played or carried on, is guilty of a misdemeanor." (Emphasis added.)

Apparently the so-called gambling statute makes a distinction as to the stakes gambled for, depending on whether certain enumerated games are played or whether "any other game" is played. As to the former, the stakes must be "money, checks, credit or anything *representative* of value." As to the latter, the stakes must be "money or anything of value." If the Hawaii Supreme Court is right when it states, arguendo, after denying that any game need be *ejusdem generis* with the enumerated games, that the pinball machine game was a "banking" game and hence one of the enumerated games, then the stake involved must be "anything representative of value." *Territory v. Uyehara,* supra. It would require some strenuous mental gymnastics to find "anything representative of value" when free games only are awarded without the intermediate use of slugs, tokens or the like. Slight reflection is enough to convince any reasonable person of the difficulties involved in the application of different stakes depending upon the type of game played. Judicial construction literally of the involved

statute could easily result in an absurdity, a result which cannot be assumed as intended by the legislature. Obviously, the courts, to avoid an absurd construction, must construe both terms to be substantially equivalent. And where a penal statute is involved, the courts must construe the statute strictly and accept the construction most favorable to the accused. Or, as it is stated,

> "It has long been a well settled general rule that penal statutes are subject to a strict construction. More accurately, it may be said that such laws are to be interpreted strictly against the state and liberally in favor of the accused. . . ."
>
> 50 Am. Jur. 430, Sec. 350.

> "In the interpretation of a penal statute, the tendency is to give it careful scrutiny, and to construe it with such strictness as to safeguard the rights of the defendant. If the statute contains a patent ambiguity, and admits of two reasonable and contradictory constructions, that which operates in favor of a party accused under its provisions is to be preferred, and where there is any well-founded doubt as to any act being a public offense, it should not be declared such, but should rather be construed in favor of the liberty of the citizen. Hence, penal statutes are not to be extended in their operation to persons, things, or acts not within their descriptive terms, or the fair and clear import of the language used. . . ."
>
> 50 Am. Jur. 435, Sec. 409.

This principle of strict construction of penal statutes has been applied by many of the courts in pinball

machine cases, including *State v. Waite,* supra, *Gayer v. Whelan,* supra, *State v. One Bally Coney Island No. 21011 Gaming Table,* supra, and *State v. One "Jack and Jill" Pinball Machine,* supra. This rule of construction applied to the said Section 11343 would require the courts to narrow the meaning of "anything of value" to make it no broader than "anything representative of value" regardless of whether pinball machine games are considered within the meaning of the enumerated games or not.

It is respectfully submitted that the Supreme Court of the Territory of Hawaii was manifestly in error when it held in *Territory v. Uyehara,* supra, that free games awarded for successful play of pinball machines were within the meaning and intendment of Section 11343, supra, grounding its holding on the language of the phrase "anything of value" and in not determining that the said phrase in and of itself was ambiguous and was certainly so even when considered with reference to any other language contained in that same section; that the said Supreme Court was in error in not resorting to legislatively imposed guides for construction of statutes, in not considering other legislation using the same or a substantially similar phrase and in not treating the said Section 11343 as penal and therefore required to be strictly construed in favor of the accused. The Supreme Court was also in error in treating the specifications as involving solely the meaning to be given to the phrase "anything of value" and not, as is here urged, at least the construction of additional phrases of the

same statute, including "anything representative of value."

SPECIFICATION OF ERROR NO. 2.

THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN RULING THAT SECTION 11343 OF THE REVISED LAWS OF HAWAII, IS NOT VIOLATIVE OF APPELLANT'S CONSTITUTIONAL RIGHTS IN THAT SAID STATUTE IS VAGUE, INDEFINITE AND UNCERTAIN.

Section 11343 of the Revised Laws of Hawaii, 1945, under which appellant was charged, provides that:

> "Every person who deals, plays, or carries on, opens or causes to be opened, or who conducts either as owner or employee, whether for hire or not, any game of faro, monte, roulette, tan, fan tan, or any banking or percentage game played with cards, dice or any device for money, checks, credit or anything representative of value or any other game in which money or anything of value is lost or won, and every person who plays or bets at or against any such prohibited game or games, and every person present where such game or games are being played or carried on, is guilty of a misdemeanor."

The Honolulu District Court ruled that the said statute was not void for indefiniteness and uncertainty. On appeal, the Hawaii Supreme Court upheld that ruling. We urge that both courts erred in so ruling.

The abstract principles applicable when a court is called upon to determine whether a particular statute is void for vagueness and indefiniteness are too well known as to require hardly any citation. It is stated in *Connally v. General Construction Co.,* 269 U. S. 365, 70 L. Ed. 322, 46 S. Ct. 126 (1926) that:

> "A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."

In *Lanzetta v. New Jersey,* 306 U. S. 451, 83 L. Ed. 888, 59 S. Ct. 618 (1939), Mr. Justice Butler, speaking for the Court, said:

> "It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. (Citations omitted.) No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids."

Mr. Justice Butler then cites the *Connally* case with approval.

In *United States v. Cardiff,* 344 U. S. 174, 97 L. Ed. 200, 73 S. Ct. 189 (1952), it is stated:

> ". . . The vice of vagueness in criminal statutes is the treachery they conceal in determining what persons are included or what acts are prohibited. Words which are vague and fluid (citations omitted) may be as much of a trap for the innocent as the ancient laws of Caligula. We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face

> apparently gave him the right to withhold. That would be making an act criminal without fair and effective notice. (Citation omitted.)"

In *American Communications Asso. v. Douds,* 339 U. S. 382, 94 L. Ed. 925, 70 S. Ct. 674 (1950), the court states:

> "The applicable standard, however, is not of wholly consistent academic definition of abstract terms. It is, rather, the practical criterion of fair notice to those to whom the statute is directed. The particular context is all important."

Many more of the so-called tests for determining statutory indefiniteness or vagueness can be called to the attention of the Court. Many cases can be cited where courts have struck down statutes on the ground of indefiniteness and uncertainty. On the other hand, the case books are filled with instances where statutory terms have been upheld where those terms have been alleged to be fatally indefinite and uncertain. See 83 L. Ed. 893 for illustrative criminal cases. Whatever the test applied by a particular Court called upon to determine whether particular statutory provisions were fatally vague, indefinite, or uncertain, in each instance the Court has scrutinized the provisions, both standing alone and in connection with the other provisions of the same statute. We urge that this Honorable Court do likewise and make a determination whether Section 11343, supra, as written, provides sufficient notice to the appellant.

Let us assume, as we must, a person in the position of the appellant, desirous of installing a pinball ma-

chine game awarding free games to successful players. Can such a person tell by an examination of Section 11343, that its provisions or any of them is violated by an installation of such a machine, to the extent required by the Constitution? Such a player in his examination might first notice that certain games are enumerated. They are faro, monte, roulette, tan, fan tan, or any banking or percentage game. He might conclude reasonably that a pinball machine game is a banking game as the Hawaii Supreme Court has done so in *Territory v. Uyehara,* supra. It certainly is not any of the others. Then he would notice that these enumerated games must be played with cards, dice or any device. He could conclude that a pinball machine is a "device." If a pinball machine game is one of the enumerated games and a pinball machine is a device, then, according to the statute, the game must be played for money, checks, credit or anything representative of value. Is a free game any of them? It would require great imagination for him to so conclude. If a free game is anything of value, what represents it? Here there is no slug, token, coupon or anything tangible. Such a person could reasonably conclude that the statute did not prohibit the particular activity at least if it were one of the enumerated games.

Let us assume, further, that such a person goes on to examine the phrase "or any other game in which money or anything of value is lost or won." It is obvious that *anything of value* is not synonymous with *anything representative of value.* If they differ

in meaning, as they appear to do, which is broader? Do the meanings overlap? Why did the legislature differentiate between an enumerated game and any other game? Even to a reasonable person there appears no good reason. These and other questions including the meaning of "anything of value" might well tax the resources of an experienced criminal lawyer. Complete bewilderment is the consequence when those questions are posed to a layman.

Enough has been said indicating the dilemma faced by the appellant. Has the crime as stated in the said Section 11343 been "so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue?" Does such a person have to speculate as to the meaning of the said statute? It is submitted that the said Section 11343 is so vague, indefinite and uncertain that prosecution of the appellant under it denies to him due process of law. The said statute requires him to guess not only as to the meaning of "anything of value" but also as to the meaning of "anything representative of value" and whether both phrases have different meanings. It also requires him to speculate whether the enumerated games are treated differently from "any other games," whether a "banking" game included pinball machine games, and the types of gambling paraphernalia that must be used in the play of "any other games." It is submitted that the said Section 11343 did not give the appellant sufficient notice that the operation and play of a pinball machine game wherein only free plays were awarded to

successful players violated its provisions or any one of them.

It should be borne in mind that the appellant does not contend that the legislature does not have power to prohibit the playing of pinball machine games, regardless of the type of "prizes" awarded or whether any prize at all were awarded, nor that the legislature does not have the power to prohibit manufacture or possession of pinball machines. Those questions and others that readily come to mind are not before us. The question before this Honorable Court is only whether Section 11343, supra, has constitutionally and effectively prohibited the use of pinball machine games where the only awards are free games to successful players without the use of slugs, tokens, or the like.

CONCLUSION.

For the reasons hereinabove set forth appellant respectfully submits that the judgment and sentence of the courts below should be reversed.

Dated, Honolulu, Hawaii, June 1, 1959.

Respectfully submitted,
HYMAN M. GREENSTEIN,
Attorney for Appellant.

(Appendix Follows.)

Appendix.

Appendix

Chapter 288, Gambling, Lottery.

Section 288-4, Revised Laws of Hawaii, 1955
(Formerly, Section 11343, RLH 1945)

"Playing prohibited games. Every person who deals, plays or carries on, opens or causes to be opened, or who conducts either as owner or employee, whether for hire or not, any game of faro, monte, roulette, tan, fan tan, or any banking or percentage game played with cards, dice or any device for money, checks, credit or anything representative of value or any other game in which money or anything of value is lost or won, and every person who plays or bets at or against any such prohibited game or games and every person present where such game or games are being played or carried on, is guilty of a misdemeanor."